



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 30, 1994

Mr. Stephen L. Braun
Law Offices of Bracewell & Patterson, L.L.P.
South Tower Pennzoil Place
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR94-323

Dear Mr. Braun:

You have asked this office to determine if certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 24604.

The Katy Independent School District (the "district") received a request from a student's parent for "[a]ny and all information" concerning a named teacher. The requestor indicated she was interested in copies of the teacher's "work record" from the district; information the district has about the teacher's work at other schools; complaints made against the teacher; actions taken against the teacher by the district; and "resolutions to the complaints lodged against [the teacher.]" You have submitted as responsive to this request various documents labeled as Attachment Nos. 2 through 6. We will consider the attachments and your arguments as to why these documents should be excepted from disclosure.

Attachment No. 2 - Investigation Information

These documents pertain to a confrontation that occurred between the named teacher and the requestor's child during the school band's performance at a football game. You have submitted a list of names of witnesses to the confrontation who were contacted by telephone; statements from witnesses and those involved in the incident, many of which are handwritten; and several letters from parents and students that are related to the occurrence. You contend that the list, the statements, and the letters are excepted under section 552.101, section 552.114, and the provisions of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232(g).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides that educational records are excepted unless released in conformity with FERPA

requirements. The term "student records" in section 552.114 has been generally construed to be the equivalent of "education records" as defined by FERPA. Education records (1) contain information directly related to a student and (2) are maintained by an educational agency or institution or by a person acting for such an agency or institution. *Id.* § 1232g(a)(4)(A). A review of the submitted documents indicate that the witness list, the statements, and the letters are education records and therefore subject to FERPA restrictions.

Section 1232g(a)(1) provides in part:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. . . .

Section 1232g(b)(1) provides in part:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization

Under section 1232g(a)(1)(A), the district may not withhold from this requestor her child's education records. Section 552.114 also provides for these records to be released to the parent. However, while these are education records that pertain to the requestor's child, the records at issue also identify other students and parents. Information that identifies the other students and parents must be withheld from disclosure, unless released in accordance with FERPA. *Id.* § 1232(b)(1); Open Records Decision No. 332 (1982) at 3. Therefore, the district must release to the requestor these education records, but without identifying information about other parents and students, unless these parents have given written consent to the release, in accordance with FERPA. The handwritten statements by students other than the requestor's son must be withheld in their entirety, since a student's handwriting may identify the student. Open Records Decision No. 224 (1979). We have marked the information that must be withheld.

In one of the letters you submitted we marked information that is protected by the common-law right of privacy under section 552.101. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1976), *cert. denied*, 430 U.S. 93 (1977); Open Records Decision No. 328 (1982) at 2-3. This letter contains information that is highly intimate and embarrassing to a reasonable person and of no legitimate interest to the public. The marked information must therefore be withheld from disclosure.

As to the information in Attachment No. 2 that is not otherwise excepted from disclosure, you contend this information is excepted under the informer's privilege because assault charges have been filed. This office has interpreted the statutory predecessor to section 552.101 to incorporate the informer's privilege and protect the identity of a person who reports a possible violation of the law to officials having the duty of enforcing particular laws. Open Records Decision No. 549 (1990) at 4-5; 515 (1988) at 2-3. In *Rovario v. United States*, 353 U.S. 53, 59 (1957), the United State Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officials charged with enforcement of that law. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

We note initially that you do not indicate which of the parties involved has filed assault charges and against whom. Although the statements pertain to one confrontation, incidents prior to that confrontation and after that confrontation involving other individuals were also discussed. This was a public confrontation witnessed by a number of individuals, many of whom seem to know one another. We note that the privilege is not applicable when the informant's identity is known to the party who is the subject of the complaint. See Open Records Decision No. 208 (1978). Further, the statements were made to the district rather than a law-enforcement agency. This does not appear to be the type of situation which implicates the informer's privilege. The information in Attachment No. 2 that is not excepted as discussed previously must be disclosed.¹

Attachment No. 3 - Employment Information

Attachment No. 3 is employment information about the teacher named in the request.² You contend that the information is protected by constitutional or common-law privacy under section 552.101, which protects information "considered to be confidential by law, either constitutional, statutory, or by judicial decision." In *Industrial Foundation*

¹Because this requestor is the parent of the child, the identifying information about her child that is in these statements must be disclosed. However, we note that this identifying information may not be released to another requestor except in accordance with FERPA.

²The employment information does not contain the teacher's home address or telephone number, so section 552.024 of the Open Records Act is not implicated.

v. Texas Industrial Accident Board, the court stated that privacy is protected by the United States Constitution if the information is within certain protected "zones of privacy." 540 S.W.2d at 679. The type of information protected by constitutional privacy relates to "intimate personal relationships or activities, freedoms of the individual to make fundamental choices involving himself, his family, and his relationships with others." *Id.* As the employment information submitted to this office does not relate to such protected activities, this information is not protected by constitutional privacy. As previously stated, information is protected by common-law privacy if it is highly intimate or embarrassing to a reasonable person and the information is of no legitimate public concern. *Id.* at 685. As the employment information disclosed does not appear to be intimate or embarrassing to a reasonable person, it is not protected by common-law privacy under section 552.101.

The forms contained in Attachment No. 3 disclose the teacher's social security number, which may be confidential under federal law. Prior to releasing the teacher's social security number, the district should be sure that this information was not obtained or maintained by the district pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994) at 4; 42 U.S.C. § 405(c)(2)(C)(vii). We note that it is a felony to disclose a social security number in violation of federal law. 42 U.S.C. § 408(a)(8).³ The other employment information must be released to the requestor.

Attachment No. 4 - Career Ladder Letter

The letter at issue concerns the named teacher's career ladder status and eligibility for a stipend. You contend that this is personnel information excepted under section 552.102. This provision applies to information that if released "would constitute a clearly unwarranted invasion of personal privacy." The test for protection from disclosure under section 552.102 is the privacy test set out in *Industrial Foundation*, which is also the test for privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision No. 423 (1984) at 2. Even if the letter contains information that is intimate, information about a teacher's progress on the career ladder and eligibility for a raise in salary is of legitimate public interest. Open Records Decision Nos. 444 (1986) at 3-4 (information in a public employee's personnel file is presumed public unless expressly excepted); 329 (1982) (information relating to public employee's education and employment is generally deemed public). We note that the letter contains the teacher's social security number, which, as previously discussed, may be confidential under federal law. This letter otherwise must be released.

³Section 552.352 of the Government Code also imposes criminal penalties for release of confidential information.

Attachment Nos. 5 and 6 - Memoranda and Notes

Attachment No. 5 is a typed memorandum and related handwritten notes. Attachment No. 6 is a memorandum with handwritten notes on it. You contend that the documents are interagency or intra-agency memoranda exempt from disclosure under section 552.111. This office had previously held that section 552.111 was applicable to advice, opinion, and recommendation used in the decision-making process within an agency or between agencies. Open Records Decision Nos. 574 at 1-2, 565 at 9 (1990). However, in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), the court addressed the proper scope and interpretation of this section. In light of that decision, this office re-examined its past rulings. In Open Records Decision No. 615 (1993) at 5, we determined that to come within this exception "information must be related to the policymaking functions of the governmental body" rather than to routine personnel and administrative matters. These documents may not be withheld from disclosure under section 552.111 because they involved a routine personnel matter concerning an incident involving a teacher.⁴

You also contend that Attachment No. 5 is personnel information excepted under section 552.102. As stated previously, the test to determine whether information is private and therefore excepted from disclosure under section 552.102 is whether the information is highly intimate or embarrassing to a reasonable person and of no legitimate public concern. Although information in these documents might be embarrassing to a reasonable person, the grievance concerns the job performance of a district employee. This is of legitimate public concern. Open Records Decision Nos. 470 (1987) at 4 (public has a legitimate interest in the job performance of public employees; 423 (1984) at 2 (scope of public employee privacy is narrow).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

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⁴Although we are unable to read what the handwritten note says, if it is identifying information about a student, this information may be subject to FERPA and the requirements concerning release of education records.

Ref.: ID# 24604

Enclosures: Marked documents

cc: Mrs. Cheryl Dreas
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(w/o enclosures)